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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

11 UNITED STATES OF AMERICA,) No. CR-08-0399 PJH
12 Plaintiff,)
13 vs.) DEFENDANT'S SUPPLEMENTAL BRIEF
14 JAIME SALCEDO MENDOZA,) TO EXCLUDE EVIDENCE OF HIS PRIOR
15 Defendant.) CONVICTIONS
16 _____)

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INTRODUCTION

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Defendant Jaime Salcedo Mendoza respectfully urges the Court to follow the central
teaching of *Apprendi v. New Jersey*, 530 U.S. 466, 120 S.Ct. 2348 (2000) and rule that the fact of
a prior conviction need not be alleged and proved to a jury in this case.

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DISCUSSION

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**The Court Should Deny the Government's Request to Admit Evidence of the
Defendant's Previous Felony Convictions**

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This Court should deny the government's motion to admit unduly prejudicial evidence of
Mr. Salcedo Mendoza's prior convictions under California Health and Safety Code § 11350(a).

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As an initial matter, the defense and the government seem to be in substantial agreement

1 that *United States v. Salazar-Lopez*, 506 F.3d 748 (9th Cir. 2007) “is still good law.” U.S. Supp.
 2 Br. at 1. Most importantly for present purposes, *Salazar-Lopez* explains that the government can
 3 avoid *Apprendi* error simply by alleging the date of removal in the indictment and proving it to a
 4 jury: “As such, the date of the removal, or at least the fact that Salazar-Lopez had been removed
 5 after his conviction, should have been alleged in the indictment and proved to the jury.” *Id.* at
 6 752.

7 The principle Ninth Circuit case relied upon by *Salazar-Lopez*, *United States v. Covian-*
 8 *Sandoval*, 462 F.3d 1090 (9th Cir. 2006), also remains good law. *Covian-Sandoval* clearly
 9 established that a judge may enhance a sentence under Title 8 U.S.C. § 1326(b) based on a prior
 10 conviction even if the fact of the conviction was not charged in the indictment, submitted to a
 11 jury, or proved beyond a reasonable doubt. *Id.* at 1096. This is an unsurprising restatement of
 12 *Apprendi*.

13 In *Covian-Sandoval*, the Ninth Circuit squarely rejected the contention that a sentencing
 14 court cannot enhance a sentence based on its own finding of fact of a prior felony conviction:
 15 “[t]he fact of a prior conviction . . . can be found by a sentencing court.” *Covian-Sandoval*,
 16 *supra*, at 1097.

17 Contrary to the government’s reading of the case, *Garcia-Aguilar v. U.S. Dist. Court*, ____
 18 F.3d ___, 2008 WL 3009680 (9th Cir. Aug. 6, 2008) says nothing that would negate the
 19 foregoing established principles. *Garcia-Aguilar* notes that *Covian-Sandoval* “explained
 20 convincingly how *Apprendi* applies” to 8 U.S.C. § 1326(b). *Garcia-Aguilar*, 2008 WL 3009680
 21 at *1. Further, *Garcia-Aguilar* emphasizes that “the sequence of a defendant’s previous
 22 conviction and removal is a fact separate from the prior conviction itself.” *Id.* at *1 (emphasis in
 23 original),¹; see also *Salazar-Lopez*, 506 F.3d 748, and *Covian-Sandoval*, 462 F.3d 1090.

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25 ¹ The defense notes that the government appears to misquote this passage. Although the
 26 government added its own italics for rhetorical weight, it neglected to include or note the Ninth
 Circuit’s italics, which serve to emphasize the importance of establishing the *timing* of removal
 relative to a conviction, rather than the existence of the underlying offense.

1 Despite the overwhelming weight of authority, the Government tepidly argues that
2 *Garcia-Aguilar* “may overrule” *Salazar-Lopez*. U.S. Supplemental Brief at 1:20. However, as
3 this Court is well aware, Ninth Circuit caselaw treats the panel opinions in *Salazar-Lopez* and
4 *Covian-Sandoval* as binding precedent subject to invalidation only by an en banc court, the
5 United States Supreme Court, or an Act of Congress. *Hart v. Massanari*, 266 F.3d 1155, 1171
6 (9th Cir. 2001). The government’s contention that the Ninth Circuit might someday overrule or
7 limit *Salazar-Lopez* is speculative and should fail in the face of the serious risk of undue
8 prejudice that the introduction of unnecessary conviction evidence would portend².

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11 Dated: September 3, 2008

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Respectfully submitted,

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/s/

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25 ² Arguments over what constitutes an aggravated felony are questions for another day,
26 since prior convictions are a matter to be decided by the judge, not the jury. In any event, the
defense agrees that Supreme Court precedent has resolved the issue. See *Lopez v. Gonzalez*, 127
S.Ct. 625 (2006) and *United States v. Rodriguez*, 128 S.Ct. 1783 (2008).